

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

BRADLY CUNNINGHAM,

Case No. 6:17-cv-00671-CL
FINDINGS AND RECOMMENDATION

Petitioner,

v.

BRANDON KELLY,

Respondent.

CLARKE, Magistrate Judge:

Petitioner, an inmate at the Oregon State Penitentiary and appearing pro se, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging his conviction for murder. However, petitioner did not submit the required \$5.00 filing fee or an application to proceed in forma pauperis.

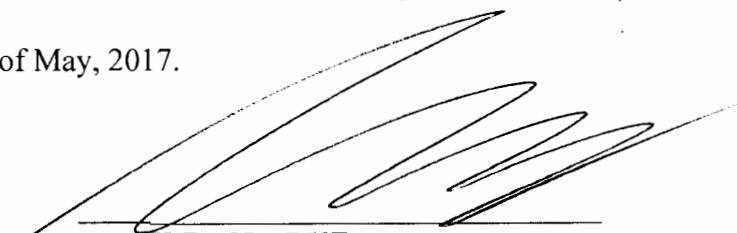
Moreover, this petition is successive and should be dismissed. Before filing a successive petition for habeas relief, petitioner must receive permission from the Court of Appeals for the Ninth Circuit. 28 U.S.C. § 2244(b)(3)(A). “Generally, a new [§ 2254] petition is ‘second or successive’ if it raises claims that were or could have been adjudicated on their merits in an earlier petition.” *Woods v. Carey*, 525 F.3d 886, 888 (9th Cir. 2008) (citation omitted). In this

case, petitioner claims that his conviction is invalid because he was “intentionally and brutally tortured” during his pretrial detention and rendered incompetent and unable to assist in his defense. Petitioner previously challenged the same conviction in *Cunningham v. Oregon*, Case No. 3:05-cv-01310-JE, and in 2010 the court denied petitioner’s claims on their merits and dismissed the action with prejudice. Petitioner could have raised his current claims in his prior petition, and he does not indicate that he has received permission from the Ninth Circuit to file a successive petition.

Accordingly, this court lacks jurisdiction over the current habeas petition (ECF No. 1) and it should be dismissed. 28 U.S.C. § 2244(b)(3)(A); *Burton v. Stewart*, 549 U.S. 147, 153 (2007) (per curiam); *Cooper v. Calderon*, 274 F.3d 1270, 1274 (9th Cir. 2001) (per curiam). The court should decline to issue a Certificate of Appealability on the basis that petitioner has not made a substantial showing of the denial of a constitutional right pursuant to 28 U.S.C. § 2253(c)(2).

This Findings and Recommendation will be referred to a district judge. Objections, if any, are due within (14) days from service of the Findings and Recommendation. If objections are filed, any response is due fourteen (14) days after being served with a copy of the objections. The parties are advised that the failure to file objections within the specified time may waive the right to appeal the District Court’s final order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

DATED this 11 day of May, 2017.



MARK D. CLARKE
United States Magistrate Judge